IN THE MATTER OF THE HUMAN RIGHTS CODE, 1981, CHAPTER 53, AS AMENDED;

AND IN THE MATTER OF THE COMPLAINT MADE BY DARLENE OUIMETTE ON JULY 9, 1986, AMENDED APRIL 12, 1988, ALLEGING DISCRIMINATION ON THE BASIS OF HANDICAP BY LILY CUPS LTD., PAUL SAWYER AND AL GEMOTTINE (RESPONDENTS)

Board of Inquiry: Dr. D.J. Baum

Appearances:

Ontario Human Rights Commission -
Anita Lyon, Counsel
Darlene Ouimette -
pro se
Respondents -
David Elenbaas, Counsel
Graphic Communications International Union, Local 466 -
Dana Randall, Counsel

Hearings: May 8, 9, July 5, 6, August 23, 24, 1989, at Toronto, Ontario.

I
The Complaint

This is a complaint alleging intentional discrimination in employment on the basis of handicap within the meaning of sections 4(1) and 9(b) of the *Human Rights Code*. In the alternative, the complaint states there was discrimination because of handicap within the meaning of section 10 of the *Code*. In effect, the complaint is that the Respondents caused the discharge from employment of the Complainant, Ms. Ouimette, a probationary employee, because she was absent from work for three days in a three-week period. This discharge was in part the result of a mandatory three-day absence discharge rule for probationary employees, regardless of cause.

The amended complaint, signed by Ms. Ouimette, states:

> 1. I was hired as a packer with Lily Cups Ltd. on February 12, 1986.
>
> 2. At the time I was hired, I informed my employer of my back problem, asthma and allergies. While I was employed with the company I experienced no difficulties with these at all.
>
> 3. On March 2, 1986, I had an allergic reaction to medication and called in sick. Later on I felt better so I asked my supervisor Mr. Al Gemottine if I should come in for the rest of the day. He said it wasn't necessary.
>
> 4. On March 23, 1986, I had the flu and subsequently called security to leave word with Mr. Gemottine should that my absence cause problems I would come in and try to work. I do not believe he received the entire message.
>
> 5. On March 25, 1986, I returned to work at which time I presented my doctor's note to Mr. Gemottine. He informed me that his supervisor, Mr. Paul Sawyer, was letting me go because I had too many medical problems which could result in excessive absenteeism.
>
> 6. I offered to get a letter from my doctor to explain that my medical problems would not interfere with my work. Mr. Sawyer wanted no part of it.

7. On March 27, 1986, I called Mr. Sawyer requesting a meeting to discuss my dismissal. He informed me that the decision was final and he did not wish to discuss the matter any further.

8. *It is my understanding that the company has an unwritten policy to dismiss probationary employees who have been absent for three days regardless of cause. Such a policy, although neutral on its face, would result in the exclusion or restriction of a group of persons identified on the basis of handicap and is neither reasonable nor bona fide in the circumstances.*

9. I am a person who was ill and I believe that my right to equal treatment in employment without discrimination because of handicap was infringed in contravention of sections 4(1) and 8 of the Human Rights Code, 1981, Statutes of Ontario, 1981, Chapter 53, *as amended by Statutes of Ontario, Chapter 58, section 39, Statutes of Ontario 1986, chapter 64, section 18, and section 70. I also believe that in maintaining the policy described in paragraph 8 thereof, the Respondents are in violation of section 10(1) of the Human Rights Code, 1981, Statutes of Ontario, 1981, Chapter 53, as amended by Statutes of Ontario, Chapter 58, section 39, Statutes of Ontario 1986, chapter 64, section 18, and section 70.*

The italicized portions of the complaint reflect those segments which were amended two years after the original complaint was filed. The complaint was broadened, as noted, to encompass the Respondent Company's [Company] three-day absence rule for probationary employees.

In the second day of hearing, *after Ms. Ouimette had been fully examined,* Commission Counsel attempted to further enlarge the complaint during the testimony of Dr. Paul Crawford, who was called by the Commission both as an expert on asthma and as a physician for Ms. Ouimette. At the time, it appeared that that effort was directed toward presenting evidence as to the nature of asthma as a handicap. Strong objection was made by Counsel for Respondents as to such general expert evidence:

> . . . [T]he factual allegations which form the basis of the subject matter of the complaint, are that the Complainant suffered from illnesses during the course of her employment; one, being an allergic reaction to medicine, a medication; two, being that she suffered from the flu. I don't believe that asthma is a relevant issue at this particular hearing. It certainly hasn't been one that

has been framed in the complaint . . . . [Tr. 158-159]

Commission Counsel responded by formally requesting to amend the complaint. This involved not only the matter relating to asthma, but it also directly related to the testimony of Ms. Ouimette which already had been taken:

> Ms. Lyon: . . . [I]n view of your [the Chairman's] statements on the record as to your concerns about the relationship of asthma, I . . . move . . . to amend the complaint . . . in the following terms:
>
> . . . Paragraph 2 . . . "At the time I was hired, I informed my employer of my back problems, asthma and allergies. While I was employed with the company, I experienced no difficulties with . . . ."
>
> And I would change it to "*with these during my working hours.*" Then paragraph 3, [which now reads]:
>
> "On March 2, 1986, I had an allergic reaction to medication."
>
> And I would add to it "*as a consequence of being asthmatic and called in sick.*" And those are the two amendments I would ask to make. . .
>
> The drafter of the complaint and the complainant are not medical experts. They were unaware of the relationship between the allergic reaction and the asthmatic condition.
>
> In fact, the medical evidence I would seek to present, shows that the allergic reaction is a different kind of asthmatic attack. That intrinsic asthma is asthma that is caused by internal conditions. And extrinsic asthma is asthma caused by outside agents. That the attack caused by the outside agent to an asthmatic would not be seen as the usual attack because it was caused by a legitimate nature. It was not caused by the usual internal feelings which would give rise to it.
>
> For this reason, Mr. Chairman, the complainant and the investigator did not understand the relationship between the allergic attack and the asthma, which has become apparent in the last few weeks, as he has been doing some medical study on this matter . . . . [Tr.

I denied Commission Counsel's motion to amend the complaint. At the time I stated:

> The motion to amend the complaint is denied. In saying that, however, I am not denying, on the face of the complaint, the right to demonstrate that an asthmatic attack occurred because of the ingestion of aspirin. Nor am I denying in any way, proof that Ms. Ouimette suffers from an asthmatic condition. What I am doing is not opening up this complaint, I think more by implication, to a general review of asthma, as such. This complaint relates to a person, and alleged systemic discrimination on the part of the company . . .
>
> In saying this, I also want to go back to the testimony being elicited from the expert witness, [Dr. Caulford], and I want to make a ruling now . . . : The doctor surely is qualified . . . to speak on . . . the ingestion of aspirin and/or other drugs that are relevant to this complaint in causing an asthmatic attack. In that regard, the doctor can describe and define the nature of that astmatic attack . . . I will not hear evidence generally [concerning asthma].

There are two other points that need to be made concerning the motion to amend the complaint:

> 1. On the face of it, Commission Counsel stated that the Commission [through its investigator] only became aware of the relationship between allergies and asthmatic condition but a few weeks before the *second day of hearing* on this matter. Putting to the side both the failure to notify Counsel for Respondents of their intent to elicit the questioned medical testimony and the fact that the proposed complaint amendment came after the very important testimony of the complainant, there is the simple fact that more than three years had passed from the time of complaint. The matter was at hearing. Through fact finding and conciliation, the issues had been crystallized. It was wrong for the Commission at so late a date to put a potentially new cast on the proceedings. The time to have investigated had long passed.
>
> 2. The proposed complaint amendment attempted to achieve still

another improper objective: As noted, Ms. Ouimette had testified fully. Her examination, both direct and cross, had taken several hours. It was clear in the cross-examination of Ms. Ouimette that there were real conflicts between her version relating to her employment, including discharge, and that of her immediate supervisor, Mr. Gemottine, and the then Personnel Director, Mr. Sawyer.

In that regard, Respondents' Counsel challenged the credibility of Ms. Ouimette. One aspect of that challenge, which will be more fully developed in the next section of this Award, related to a statement made by Ms. Ouimette that remained unchanged both in the original and the amended complaint, namely, paragraph two which stated: "At the time I was hired, I informed my employer of my back problem, asthma and allergies. *While I was employed with the company I experienced no difficulties with these at all.*"

The proposed amendment to the complaint would have changed the italicized sentence in a significant way: "*While I was employed with the comany I experienced no difficulties with these during my working hours.*" This was precisely a point that Counsel for Respondents developed in cross-examination of Ms. Ouimette. The effect of accepting the Commission's proposed amendment would have been to have eliminated that point, all in the context of an important witness, the complainant, who had been fully examined. This could not be allowed.

The relief sought by the Commission was outlined at the start of the hearing, and it was sweeping:

1. The Commission asked for "revision of the [Company's] absenteeism policy to provide a reasonable accommodation of absences due to sickness or other forms of handicap." [Tr. 43] This new standard was not to be limited to probationary employees; it was to apply as well to seniority-rated members of the bargaining unit with whom the Company had a collective agreement through their union, the Graphic Communications International Union, Local 466 [the Union].

2. From the date of the Award, the Commission requested a monitoring system that would track *all dismissed employees for three years*. Again, this included both probationary and seniority-

rated employees.

3. A letter of assurance was sought from the Company that "there will be no further firings when an *individual is absent by reason of sickness or illness that can be justifiably shown and reasonably accommodated.*" [Tr. 44]

4. A mandatory seminar for "Company staff" concerning their obligations under the *Human Rights Code* was requested. In addition, the Commission asked that copies of the Code be posted throughout the Company.

5. Finally, both special and general damages against *each of the named Respondents* was demanded. The Commission was not satisfied that the Corporation be found liable. [Tr. 479] Commission Counsel argued that Messrs. Gemottine and Sawyer acted both wilfully and with reckless disregard of the rights of the Complainant.

The Commission did not notify the Union of its investigation or of the complaint finally issued against the Company. Yet, the fact is that the Union was directly affected by the proceedings. It, along with the Company, are the parties to the Collective Agreement. The Union is the exclusive bargaining agent for members of the bargaining unit. To the extent that the rights of seniority-rated employees under the Collective Agreement are modified, the Union as their representative has a real interest. Indeed, the Union has an interest in the probationary employees, who, although denied access to the grievance procedures of the Collective Agreement, still through operation of the remedies sought by the Commission could find themselves garbed with seniority status. The Union would have to know its role in relation to such employees because under the *Labour Relations Act*, the Union would have the obligation to fairly represent them. [Tr. 259-260]

I rejected the Commission's view that since no relief was sought against the Union, there was no need for it to be notified of these proceedings and, in that regard, to be given the opportunity to make submissions. The Commission seemed to believe that the Company could unilaterally impose changes as to terms and conditions of employment which were already encompassed within the Collective Agreement. This is not to deny the capacity of the *Human Rights Code* to alter any term or condition of employment that offends its provisions. It is to say that those directly

affected by such proposed actions have every right to know of the proceedings and to make representations. I determined that the Union should have such rights.

There is a final point to make in connection with this section of the Award. This matter does not involve a complaint for which the Commission was able to cite readily available precedent. The Complaint was couched in terms of discrimination on the basis of handicap, which is expressly identified as a prohibited ground in section 4(1) of the *Code*. Section 9(b)(i) of the *Code* defines handicap for the purpose of this Complaint:

> 9(b)- *because of handicap* means for the reason that the person has or has had, or is believed to have or have had,
>
> (i) any degree of physical disability, infirmity, malformation or disfigurement that is caused by bodily injury, birth defect or illness and, without limiting the generality of the foregoing, including diabetes mellitus, epilepsy, any degree of paralysis, amputation, lack of physical coordination, blindness or visual impediment, or physical reliance on a dog guide or on a wheelchair or other remedial appliance of device, ...

At its root, the Complaint related to alleged discrimination on the basis of *transitory illnesses*, namely, ingestion of aspirin that brought on an allergic reaction resulting in an asthmatic attack, and gastroenteritis brought on by a viral infection, commonly called, the flu. Commission Counsel candidly stated that the complaint was in the nature of a "*test case*." In her closing submissions, Commission Counsel said:

> . . . I would submit that this case in many ways is -- the first time these issues have been decided by a court [*sic*: Board of Inquiry], and therefore it is a unique case, a test case, being brought to determine whether -- *how broad the definition of handicap is*. [Tr. 554]

On its face, the scope of the complaint is indeed broad in relation to the population groups that it would cover, especially in the setting of a matter seen by the Commission as precedential. It would seem that the facts incident to establishing the complaint would have been well developed.

II
Findings of Fact

A. Direct Discrimination

The Complainant, Ms. Ouimette, had a number of health problems when she sought employment as a Packer, an unskilled job, with the Corporate Respondent, Lily Cups Inc., on February 12, 1986. On a form that Lily Cups, Inc. required to be completed by job applicants, information was sought concerning employee health. There is little question that the form was important; it related to whether the job applicant, in the view of the Company, was able to carry out her job functions. Three general questions were asked, and they were answered in the following manner:

> *Are you now or have you ever received Workers' Compensation for industrial injuries or diseases? If yes, what injuries or diseases.*
>
> Yes (Back); Sept. 26, 1985 at Laura Secord (Lower Back)
> Received compensation, $1,000.
>
> *Have you ever had a back injury? Yes ___X___ No _____*
>
> *Have you ever been refused employment because of your health?*
>
> No.
>
> *Allergies*
>
> Serum once a week - Asthma

The allergies were not listed on the form. Nor apparently was information sought by the Company concerning them. However, in direct examination, Ms. Ouimette listed them as follows: *aspirin, codeine,* certain odors, dust, some clothing. She said that an allergic reaction could induce an asthmatic attack.

It should also be noted that the form asked for information concerning height and weight. For Ms. Ouimette, at the time, these inquiries also had a bearing on her health. She indicated on the form that she was five feet three inches tall and that she weighed 200 pounds. Her weight tended to exacerbate back problems. In addition, as we shall see, by her own testimony, Ms. Ouimette attributed her excess weight at the time as a

causative factor in inducing asthmatic attacks. Ms. Ouimette signed the form affirming that the statements made were true, and that any falsehood could have resulted in termination of employment.

Having completed the form, Ms. Ouimette said she was interviewed by a member of Lily Cups' personnel staff. The questions in part went to her health. The Company wanted to know *before Ms. Ouimette actually began work* whether her health would permit full assumption of job responsibilities. Ms. Ouimette answered in the affirmative, and this is in accord with the statements she made in her complaint to the Human Rights Commission:

> A. I told them [the Company] about the back problem, allergies and asthma and that I was on medication.
>
> Q. On medication for what?
>
> A. For my asthma. I had taken ventolin and sometimes philicontin.
>
> Q. Were any other questions asked about your health?
>
> A. They asked me . . . if it interfered with my work and I said no. I explained that on occasions there may be a time I can't determine whether [or] not I am going to have an attack . . . . And I told them there may be some time when it may occur, but it normally doesn't affect my work. [Tr.56]

Ms. Ouimette in cross-examination insisted that her statements were correct. None of her health problems were a cause for work interruption. She drew lines of distinction between (1) what she claimed was an asthmatic attack which occurred during non-work hours that prevented her from going to her job [Tr. 101-103]; and (2) health difficulties which took place *"every day"* but apparently did not materially interfere with her job performance. For example, as to the last point, she testified in direct examination:

> Q. And you advised them that you have asthma. Could you tell me what symptoms you have?
>
> A. My chest gets tight and I can't breathe. I wheeze, shortness of breath.

Q. How often would that happen? How often would that have happened back in February 1986?

A. A lot more than now. I'd say -- I used to have attacks every day, because I was overweight at that time and that had a little bit to do with the asthma and that, the back problem as well.

Q. And what do you do when you have an attack?

A. I take my ventolin. Sometimes when my ventolin does not work then I end up in emergency, and sometimes they will start up an IV with aminophylin in it, and they give me a mass treatment which has saline in it.

Q. *Now, during your employment with Lily Cups, did you have to go to emergency?*

A. *Yes.* [Tr. 56-57]

It is fair to say that Ms. Ouimette at the time of her employment had a number of health problems which she disclosed in a general way to the Company. However, the scope and depth of those problems were left unstated. As far as the Company was concerned, Ms. Ouimette appeared to have the physical capacity to do the job of Packer. The decision to hire her was made by the Personnel or Human Resources Department. It was not made by Mr. Gemottine. All that he did was communicate his needs for employees to that department.

Ms. Ouimette was hired on the same day of application and interview, February 12, 1986. She was assigned as a Packer to the Plastics Department of the Company's Scarborough Plant, located at 2121 Markham Road. (The Company has a second plant in the Toronto area located at 300 Danforth Road, where the Personnel or Human Resources Department is housed.) Her immediate supervisor was Mr. Gemottine who was responsible for the third shift in the Plastics Department. The regular hours for that shift were 11 p.m. to 7:30 a.m., Sunday to Friday.

A word should be said about the Sunday shift over which Mr. Gemottine had supervision. It was the first shift of the week. If there were an unplanned absence on that shift, it could jeopardize production because, said Mr. Gemottine, there was no earlier shift to draw from, and, bearing in mind the late hour for start-up (11 p.m.), it would be difficult to bring

employees from their homes where they probably would have retired for the night. Thus, there was a need for good employee attendance especially on the Sunday night start-up. [Tr. 316]

Initially, Ms. Ouimette was assigned six-hour shifts as a Packer. In this capacity, she relieved eight-hour Packers during scheduled breaks. The job function was unskilled. It required, for example, placing plastic lids in a large sack, and folding cartons. These functions were easily learned.

Before Ms. Ouimette began her first shift, she had a lengthy orientation meeting with Mr. Gemottine that lasted, according to Ms. Ouimette, between 60 and 90 minutes. Mr. Gemottine reviewed a form titled, *New Employee Orientation Checklist* which consisted of a number of rules in the areas of attendance, safety, and production quality [Ex. 5]. Each rule was stated, discussed, and checked. The entire form, following discussion, was signed both by Mr. Gemottine and Ms. Ouimette. For our purposes, the attendance rules are relevant. They were among the first rules on the form:

> 3. Attendance rules and need for punctual and regular attendance. Call in as soon as possible for emergency replacements.
>
> 4. Permission for time off (shift change, leave of absence, unexcused and excused absence).
>
> 5. Very important - A doctor's certificate for more than two days off, or at the request of your Supervisor.

At the same meeting, Ms. Ouimette was handed a paper titled, *Scarborough Plant Rules* [Ex. 6]. Rule 12 provided: "Employees must notify the Company prior to the start of their scheduled shift if unable to report to work." Among the behaviour not permitted according to the Rules was: "Habitual tardiness and/or absenteeism .... Any employee violating the above rules will be liable to disciplinary action, including suspension or termination."

It is clear that Ms. Ouimette understood that her status was that of a *Probationary Employee*. The Collective Agreement then extant between the Company and the Union included such persons in the bargaining unit. However, during the period of their probation, sixty calender days, it denied them access to the grievance procedures of the Collective Agreement [Ex. 12]. After that time, they became seniority-rated employees with full rights under the Collective Agreement.

Article 203: . . . The first sixty days of employment shall be probationary. The discharge of an employee during the probationary period shall not be a matter of grievance or arbitration.

Article 801: New employees will be considered as probationary employees for the *first sixty calender days* of their employment and the discharge of any such employee shall not be the subject of a grievance.

Ms. Ouimette was given a copy of the Collective Agreement. In my view, she understood that the first sixty calender days was a probationary period. It is an entirely different question as to whether she understood the range of discretion that the Company held under the Collective Agreement in terms of its power to discharge without cause during the period of that probation. I believe that Ms. Ouimette knew that attendance was important to the Company. However, I believe that Ms. Ouimette thought the standard for attendance were the literal words contained in the *New Employee Checklist* and the *Scarborough Plant Rules*. These can be summarized as follows:

- Absence of two days or more required a doctor's certificate. At the discretion of her supervisor, a certificate could be required for an absence of a lesser period.

- The illness resulting in the absence had to be real.

- There was an obligation to notify the Company before the start of any shift of the absence.

- Repeated unexcused absences could result in dismissal.

I mention these points to provide the mind-set of Ms. Ouimette in relation to attendance. In her mind, so long as she complied with the stated standards, that was the end of the matter. The Company did not have the power to discharge her without reason.

It is fair to say, however, that within the meaning of the Collective Agreement, management is afforded a wide discretion in setting the terms for the probation of new employees. It is also fair to say that once those employees become seniority-rated, management discretion concerning attendance is substantially curtailed. There can be no discipline or discharge for absenteeism unless for just cause, or unless the employee by

such absence effectively ends the employer-employee relationship. As to both matters, in the final analysis, arbitration can be the means for making the final binding determination if there is a conflict as to management's action.

The evidence of Messrs. Gemottine and Sawyer make it clear that the Company had an unwritten rule, *as applied to probationary employees*: Any absence of three days would result in termination. It did not matter that the employee had a medical certificate. Nor did it matter that the absence occurred in one or more blocks of time. The reason for the rule was to try to weed out employees who might have an attendance problem at a point when there was substantial management discretion, that is, before the employee obtained seniority-rated status. It was the view of management that the check of a medical certificate often was no check at all. They could be too easily obtained. [Tr. 318-319, 326; Tr. 381-383]

This is not to say that the Company was fully successful in its efforts to instill a good attendance ethic through the probationary three-day rule. Indeed, in the last round of negotiations leading to the present Collective Agreement, the Company increased the probationary period from 60 to 90 calender days. In that context, according to Mr. Sawyer, the absence rate was cut from about eleven to twelve percent to eight percent. He could attribute no other major reason for the decrease than the extended probationary period. [Tr. 383-384]

The three-day rule was not the only standard to guide management in the handling of attendance by probationary employees. The fact was that full discretion was vested in the employee's immediate supervisor to take whatever action he/she felt appropriate, including discharge, for what the supervisor thought was an inadequate attendance record. This was not to deny the power, for example, in Mr. Sawyer to overrule Mr. Gemottine. It is simply to say that that power would only be used most sparingly. [Tr. 403]

I come now to the absences that resulted in the termination of Ms. Ouimette's employment. I will review each absence in some depth with a view toward trying to understand its nature, and the basis for the Commission's claim of discrimination because of handicap.

March 2,1986: In direct examination of Ms. Ouimette, the following is the sum total of all that was proved by the Commission concerning this one-day absence:

Q. And could you tell me why you were away on March 2d?

A. I had an allergic reaction to a drug . . . aspirin. And which in turn caused me to have an asthma attack, and I couldn't breathe and I didn't go into work that evening. A friend called in for me and she told them that I wouldn't be in. Later I felt better and I phoned Al Gemottine myself and told him that I was going to come in, and he said no, just stay home and rest and come back in the morning -- for your shift the next time.

Q. Can you tell me when you made that phone call yourself?

A. It was around four o'clock in the morning; four or four thirty; somewhere around there . . . . [Tr. 68]

Commission Counsel attempted to re-enforce the conclusion that Ms. Ouimette had taken aspirin on March 2d and suffered an allergic reaction resulting in an asthmatic attack by submitting the *Record of Statements and Positions of Respondent and Complainant* recorded during the fact-finding/conciliation processes. It was with extreme reluctance that I received the document. I did so only with the clear understanding that absolutely nothing would be permitted that trenched upon the conciliation process upon which the *Code* places a shield of confidentiality. The first sentence of paragraph three of that document, upon which the Complainant and Respondents are said to have agreed, states: "On March 2, 1986, I had an allergic reaction to medication and called in sick through a friend."

The statement does *not* respond to the evidence offered by Ms. Ouimette in her examination in chief. The statement says nothing about an allergic reaction *inducing an asthmatic attack.* Nor does the statement say anything about the nature of the alleged medication, namely, aspirin. Finally, how is it possible for the Respondents to know, other than through what Ms. Ouimette told them, what caused her absence on March 2d? In the result, it is not possible to use the so-called agreed statement as a means for binding the Respondents as to the cause of absence on March 2d.

The nature of Ms. Ouimette's illness on March 2d, its relationship to asthma, and the basis for the Commission's argument that it was a handicap, on the facts, are far from proved. In this regard, all of that which follows either was or should have been known to the Commission *during the course of its investigation:*

• Ms. Ouimette did know the circumstances under which the so-called medication was taken. Without inquiring, and apparently because she was in some pain, she took a capsule, given to her by a friend, *the contents of which she was unaware, and she suffered a reaction, which she identified as an asthmatic attack.*

This was her testimony on cross-examination:

> A. . . . It wasn't actually aspirin. It was another drug that contained aspirin. . . .
>
> Q. Is that a drug you had taken previously?
>
> A. No.
>
> THE CHAIRMAN: Was it an over-the-counter drug, or was it a drug your doctor prescribed?
>
> THE WITNESS: *No. Somebody had given it to me to try. It wasn't an over-the counter [drug].*
>
> Q. What had you previously been taking for pain?
>
> A. I would take Tylenol with no codeine.
>
> Q. And why didn't you take Tylenol without codeine?
>
> A. Because I didn't have any.
>
> Q. Were you at home at the time?
>
> A. Yes.
>
> Q. Had you ever taken aspirin or as far as you know, any aspirin-related drug prior to this day?
>
> A. No.
>
> Q. So, therefore, I guess it's fair to say you have never had a prior adverse reaction to aspirin?
>
> A. No.

Q. And I take it you haven't taken aspirin since that night, at least knowingly?

A. No. [Tr. 93-94]

. . . .

Q. Would you normally take medication that somebody has offered to you, given the condition that you have?

A. No.

Q. So it was a little bit careless on your part to do that?

A. Yes. [Tr. 95]

• There is absolutely no proof that the medication Ms. Ouimette took on March 2d was aspirin. Ms. Ouimette, herself, did not know. At best, she could only speculate. She had never taken aspirin before that time. It simply cannot be said in terms of the proof submitted that Ms. Ouimette suffered an allergic reaction to anything on March 2d. The complaint is couched in terms of discrimination on the basis of allergic reaction.

• Assume that Ms. Ouimette did suffer an allergic reaction to aspirin. Ms. Ouimette had been specifically cautioned by her own physician, Dr. Caulford, *less than a week before the March 2d absence, about the danger of aspirin:*

THE CHAIRMAN: What cautions, if any, did you give to Ms. Ouimette in terms of concern about aspirin? And, when did you give them?

THE WITNESS: Yes. I have a notation in my chart from February 27, 1986 at which time a discussion occurred regarding the potential impact of aspirin and non-steroid, other non-steroid anti-inflammatory drugs, in terms of their exacerbation of her asthma. That may have been the first time we had a discussion about it.

THE CHAIRMAN: Could you just go into that and tell me what you told her, if you can?

THE WITNESS: I can't recall the details, but at that time she was having some pain in her feet. She had, I think, previous surgery. And, I wanted to prescribe some medication for her along the lines of those medications.

And, in reviewing the file and talking to her, it became apparent that she may be one of the people who responded adversely to aspirin, given this previous record. And, I wrote in my note *No ASA* for her.

And that discussion I didn't write down what we talked about, but I recall the gist of the discussion was that *she must not use them [aspirin] because they may precipitate an asthma attack in her. I was going to prescribe them, then I wrote in capital letters, NO ASA, when I caught myself.*

THE CHAIRMAN: . . . But, aspirin, analgesics, tend to be over-the-counter drugs. And how would she know, from a practical point of view whether *a, b, c, d or z,* contained aspirin . . . ?

THE WITNESS: Well, there are numerous preparations which contain aspirin . . . . If I caution a particular individual not to take aspirin, either as we discuss it or it may be understood, that over-the-counter preparations may contain aspirin. And most people taking responsibility for their health will check the product labels and what not, discuss it with the pharmacist, or discuss it with me, if they want to take an analgesic. Certain combination preparations contain aspirin, and that's another problem. Sometimes, either by prescription or over-the-counter, there may be preparations combined with aspirin. As a physician making a prescription, it is my responsibility not to give this lady something with aspirin in it. For over-the-counter medications, I can simply warn her to be careful she is not taking something with aspirin.

• Finally, there had to be some question in the Commission's mind as to the precise knowledge of Ms. Ouimette concerning her medical condition. For example, Ms. Ouimette stated quite clearly that she was allergic to codeine. [Tr. 57] Though quoted above, I repeat the following testimony given in cross-examination:

Q. What had you previously been taking for pain?

A. *I would take Tylenol with no codeine.*

Q. And why didn't you take Tylenol without codeine?

A. Because I didn't have any. [Tr. 93]

However, the testimony of her physician, Dr. Caulford was to the contrary:

> THE CHAIRMAN: Did you suggest anything for these headaches? Or, did you prescribe anything?
>
> THE WITNESS: I usually use simple analgesics like Tylenol or Tylenol with codeine. I don't recall offhand whether I had given her anything specific for -- and I am going back outside the time frame. *I used a muscle relaxant, which is a very common treatment. Tylenol with codeine.*
>
> THE CHAIRMAN: When was that?
>
> THE WITNESS: October 1985.
>
> THE CHAIRMAN: And what was that for?
>
> THE WITNESS: Back pain primarily. Yes, back pain, not for her headache. So I did not prescribe anything specific, according to my notes for her headaches. Sometimes, . . . in an office visit a patient will say . . . I'm having some tension headaches. And, it's very common to say . . . we will try to manage it with some Tylenol rather than write down a prescription. [Tr. 186]

In re-direct examination, this apparent conflict was not resolved. No further questions were put to Dr. Caulford concerning an allergic reaction to codeine by Ms. Ouimette. And, it was Dr. Caulford who held the medical files relating to Ms. Ouimette.

The absence on March 2d must be treated as a full shift absence. It is true that Ms. Ouimette telephoned Mr. Gemottine between 4 and 4:30 a.m. offering to return to work. He refused the offer because the shift was to end within two and a half hours, exclusive of whatever time it would have

taken Ms. Ouimette to have reached the plant. Ms. Ouimette testified:

> Q. And you asked him [Mr. Gemottine] if you should come in?
>
> A. Yes.
>
> Q. And, I understand that your scheduled shift finished at 6:45 a.m.?
>
> A. Yes.
>
> Q. So I take it you weren't surprised when Mr. Gemottine told you not to bother to come in at that time?
>
> A. No. [Tr. 104]

Immediately following her return to work from the March 2d illness, Ms. Ouimette presented Mr. Gemottine with a listing of medications she took for asthma, allergies, back pain, and nerves. She also included the names of three physicians whom she consulted, including Dr. Caulford [Ex. 9]. It is important to point out that Mr. Gemottine did not request the information. Rather, Ms. Ouimette "volunteered it."

> Q. I will ask you again, Ms. Ouimette, why did you give this document to Mr. Gemottine [Ex.9]?
>
> A. Because I volunteered it. I just thought there may be a time when they will need it. I don't know. I've never withheld any information from any employer.
>
> Q. Any particular reason why you waited until after the first absence to give this to Mr. Gemottine?
>
> A. No. [Tr. 109-110]

While Mr. Gemottine denied any recollection of a discussion with Ms. Ouimette concerning her health problems at the time of orientation, it certainly is clear that such information had been communicated. This was done in the application completed on the day of employment, and later in the voluntary statement submitted by Ms. Ouimette immediately after her March 2d illness. However, all that one can say concerning this is that Mr. Gemottine was aware of those health problems at the point following the

March 2d illness. From these facts alone, no conclusion can be drawn that Mr. Gemottine in any way discriminated against Ms. Ouimette on the basis of her medical problems. Ms. Ouimette stated the following in cross-examination:

> Q. Apart from the statement that you allege Mr. Gemottine made to you on your termination [of employment] respecting your medical problems, did he ever do anything to suggest that he had a bias toward you or toward your [health] problems during your employment?
>
> A. No.
>
> Q. And did he ever do anything that you saw or suggested that [he] had any sort of a bias against any handicapped individual?
>
> A. No. [Tr. 137]

Indeed, on March 6, 1986, Mr. Gemottine, as part of his normal duties, completed an *Employee Progress Report* [Ex. 15] concerning Ms. Ouimette. On balance, he said that she had been performing well in her job [Tr. 311]. Sixteen items were listed under the heading, *Character of Service*. Items 12 and 13 are relevant for our purposes; they related to *punctuality* and *attendance*. Five evaluations were listed for marking: *excellent*, *good*, *average*, *below average*, *and unsatisfactory*. For *punctuality*, Ms. Ouimette received the mark of *good*. For *attendance* she received the mark of *average*.

Under the heading *remarks*, Mr. Gemottine wrote: "off one night due to breathing problems/ wrong medicine." He made the note because that was, according to him, what Ms. Ouimette reported [Tr. 313].

It is, I believe, fair to say that Mr. Gemottine saw Ms. Ouimette as a good worker who was punctual when she reported to work. However, he did not see her attendance record as good. One absence during the probationary period of sixty calender days was enough for him to classify her attendance as *average*.

The evaluation, prepared by Mr. Gemottine and signed as well by his department head, was not discussed with Ms. Ouimette. This apparently was an internal document for management's own use.

However, not long after it was prepared, and before the second absence of Ms. Ouimette later that month, Mr. Gemottine offered and Ms. Ouimette accepted the position of eight-hour Packer [Tr. 313]. Commission Counsel in cross-examination of Mr. Gemottine pressed for the conclusion that the position should be seen as a promotion. It meant more hours of work and, in the result, a higher rate of pay. Mr. Gemottine responded that he followed a rotation in offering the position to the then most senior six-hour Packer. I do not believe the position would have been offered to Ms. Ouimette if the Company, and more specifcally, Mr. Gemottine, did not see her as capable of doing the job. But, to say this is only to affirm Mr. Gemottine's evaluation of Ms. Ouimette: She was a good worker, who had average attendance.

March 23, 24, 1986: Ms. Ouimette was absent from work on March 23 and 24, 1986. This absence had nothing to do with her asthmatic condition. She was absent because, according to Ms. Ouimette, she had the flu, or as it is medically designated, gastroenteritis. Again, the evidence on this aspect of the case is limited. On direct examination. Ms. Ouimette testified:

> A. . . . I missed again on March 23 and 24, and that was because I had the flu. I had stomach cramps. I had diarrhea. I phoned. I left word with the security guard on the first evening . . . . It was around ten o'clock. I am not sure. . . . And, the following evening I still wasn't feeling that great and I called again, and I had left a message saying that I wouldn't be in, and to have him [Mr. Gemottine] phone me, urgent. He never phoned me . . . . I wasn't feeling well and I didn't want to lose my job because I know I am new. [Tr. 68-69]

Ms. Ouimette returned to work on March 25, 1986 at which time her employment was terminated. The version relating to that termination given by Ms. Ouimette, brought out more fully in cross-examination, not only conflicts with that given by Mr. Gemottine, it also contains some contradictory elements in itself:

> A. [Mr. Gemottine] looked at me and he asked what I was doing there. And, I says well, I says I came to work. And he says, you look ill. He felt my forehead and he said I had a fever and I hadn't even started working yet, and I was perspiring, and that I didn't look good at all. I should be home in bed. And he asked what I was doing there, and I said I don't want to lose my job. And he said it's

too late for that. The people above me told me to let you go, and you've had too many medical problems. [Tr. 128]

An important question put to Ms. Ouimette was whether Mr. Gemottine mentioned the three days of absence as a basis for discharge. This goes not only to the Company's internal three-day absence rule for probationary employees, it also relates to the credibility of Ms. Ouimette's testimony. Within the space of a few minutes, Ms. Ouimette first said no mention was made of the three days of absence, and then that Mr. Gemottine did speak of it:

> A. When I walked in, he [Mr. Gemottine] told me that I was -- it was too late. I says, why, are you firing me? He said yes.
>
> And I says, but I have a doctor's note right here to give to you and he says, I'm sorry. It's too late for that. *And, he didn't mention anything about the fact that I had missed more than three days.*
>
> Q. He didn't mention absenteeism at all?
>
> A. He just said that with the medical problems that I had, it would result in a lot of time off work. [Tr. 129]

Then, at Transcript pages 130-131, Ms. Ouimette testified:

> Q. Mr. Gemottine's evidence is going to be that he told you that your employment was being terminated because of excess absenteeism or attendance problem. Did he tell that to you?
>
> *A. He mentioned about the three days I was off.*
>
> *Q. He did mention about the three days you were off?*
>
> *A. But I said I was sick and I handed him the doctor's note.*

Mr. Gemottine's evidence of the termination, as indicated, is quite different from that of Ms. Ouimette. Mr. Gemottine stated that he determined to discharge Ms. Ouimette after her absence of March 23d. This was a Sunday, and the problems incident to a start-up for the week were presented. It was the second Sunday start-up that Ms. Ouimette missed during her probationary period which had only reached the half-way point in the sixty-calender day run. Further, the additional absence of March

24th placed Ms. Ouimette within the Company's three-day absence rule applied to probationary employees. Mr. Gemottine was firm in his statement that it was simple quantitative absence that caused him to discharge Ms. Ouimette. Her health problems had no role to play in that decision. Finally, the decision to discharge Ms. Ouimette was that of Mr. Gemottine alone; it was not taken in consultation with any other person. I quote extensively from the testimony of Mr. Gemottine. I do this to underline the clarity of the questions and the answers he gave, and, as will be discussed shortly, the failure on the part of Commission Counsel to cross-examine Mr. Gemottine as to the reasons he offered concerning the termination of Ms. Ouimette's employment:

> Q. Did you decide to do anything as a result of the complainant's absences?
>
> A. Yes, I did . . . . I decided to terminate her.
>
> Q. And, was anyone else involved in that decision?
>
> A. No, they weren't . . . .
>
> Q. Did you advise anyone in the company before you terminated her employment?
>
> A. No, I didn't.
>
> Q. Why did you decide to terminate the complainant's employment?
>
> A. I decided to terminate Darlene, that she had two Sunday night start-ups [absent] and that gave me the impression, [I] got the feeling that this would progress into her probationary period. [Tr. 315-316]
>
> . . .
>
> Q. Were there any other reasons you decided to terminate the complainant's employment?
>
> A. No, there wasn't.
>
> Q. Mr. Gemottine, did you have the authority to make the decision to terminate her employment yourself?

A. Yes, I did.

Q. Did you consider the reason for the complainant's absences when you decided to terminate her?

A. No, I didn't.

Q. And, why didn't you?

A. . . . [R]easons are very hard to follow up. I was concerned about the attendance and not really the reasons . . . . Well, if a person says they are sick, how can you justify that? How can you find out? It's just an employee's word saying that they are sick.

Q. What if the employee produces a medical certificate?

A. Medical certificates are usually a dime a dozen. Anyone can obtain a medical certificate. [Tr. 318]

. . .

A. . . . And then [Ms. Ouimette] turned around and she says, Am I in trouble? And, I said, yes, you are. And I said I am terminating you for poor attendance.

Q. And, what did she say to that?

A. She got very emotional and she said I was sick.

Q. What did you say?

A. And, I said to her, I am still going to terminate her for her poor attendance. I said she had three days off and I was terminating her.

Q. Anything else said during your conversation with her?

A. She was a little on the emotional side, and she said to me . . . who is my boss. And, I told her my boss was Mac Alam. She said, I want to see your boss. And, I said he won't be here until tomorrow morning. Well, . . . then she says I'm going down and see personnel, where she was hired. And, I says you didn't have to go all the way down there. I says we have an assistant personnel over at 2121

> Markham Road right now. She says, okay. And, then she turns around and she says: This has happened to me before. So, I'm not going to put up with it anymore. And, she says I'm going to do something about it.
>
> Q. And, what did you say to that?
>
> A. I didn't say nothing. The whole conversation only lasted a few minutes, you know. When she got kind of emotional and everything else, I wanted to make it [the conversation] as short as possible. [Tr. 319-320]

Commission Counsel's cross-examination of Mr. Gemottine was, to say the least, extensive. Significant leeway was allowed in terms of the scope of that examination. However, *absolutely nothing was asked of Mr. Gemottine concerning the conflict of his testimony with that of Ms. Ouimette.* Indeed, cross-examination seemed directed more toward whether a single absence at Sunday start-up could be accommodated. There were only two points made relating to the discharge meeting between Mr. Gemottine and Ms. Ouimette:

> (1) Did Mr. Gemottine receive a medical note concerning the reasons for the absence? He answered that he probably did not receive such a note. If he had, he would have forwarded it to personnel. Nothing more was asked. [Tr. 352-353]
>
> (2) In a general way, Commission Counsel questioned whether Mr. Gemottine had discharged a number of employees in the course of his career at Lily Cup. He answered in the affirmative, and there the matter rested. [Tr. 361-362]

Commission Counsel in her reply in closing argument stated that Mr. Gemottine was present during the hearing. He had the opportunity to hear Ms. Ouimette. In her view, that should have been enough [Tr. 561-562]. The basis for decision in this kind of proceeding is on the record alone. Ms. Ouimette's view of what was said in the conversation on March 25th should have been presented. There was no opportunity for further explanation by Mr. Gemottine on a point where his credibility was to be impeached. (See, *Browne v. Dunn, (H. L.)*, 1894, 67, at pp. 70-71.)

Reference already has been to the internal conflict within Ms. Ouimette's testimony and to the failure of Commission Counsel to cross-examine Mr.

Gemottine as to the apparent conflict between his version of the events surrounding the termination meeting. There is one final point, which considered with the others, or taken individually, causes me to prefer the evidence of Mr. Gemottine over that of Ms. Ouimette. It is the affidavit of Dr. V.W. Chiu [Ex. 10].

Dr. Chiu was the Commission's witness. It was the Commission which requested the affidavit, and Respondents' Counsel agreed in order to expedite proceedings. Dr. Chiu, an associate of Dr. Caulford, was the physician Ms. Ouimette visited on March 25th, the day she returned to work and was discharged. There was little doubt that Dr. Chiu found Ms.Ouimette in good health and able to return to work. He stated:

> 5. I examined her general appearance and conducted a manual examination of her abdomen. I determined that she was not in any physical acute distress and was well hydrated. The examination of the abdomen proved negative.
>
> 6. I determined that she was fit to return to work and provided her with a note for her employer. At this point I cannot recall what the note said.

Yet, Ms. Ouimette in her testimony, set out above, stated that she attended work visibly feeling ill, perspiring. In that regard, Mr. Gemottine, according to Ms. Ouimette, commented on her appearance, felt her forehead, said she had a fever, and she should have been home in bed [Tr. 128]. This simply does not square with the affidavit of Dr. Chiu, the Commission's own witness.

The Commission placed some emphasis on the fact that the absences of March 23 and 24 were marked as excused by the Company. It adds to this an apparent conflict as to whether Mr. Gemottine received a telephone call concerning one of the three days of absence. All of the points have little bearing on the central findings: Mr. Gemottine did not terminate Ms. Ouimette's employment because of unexcused absences. There was no question of Ms. Ouimette engaging in culpable conduct. Mr. Gemottine made it abundantly clear that his reason for terminating her employment was related only to the fact of (1) two Sunday start-up absences; and (2) three absences during the probationary period in violation of the Company's internal rule. It was the number of absences, not the reasons for them, which concerned Mr. Gemottine.

Indeed, one has the impression that the Commission, itself, understood that point when it presented Ms. Ouimet's version of her conversation with Sheila Elder, then Mr. Sawyer's assistant in the industrial relations department, following her discharge:

> I was upset when I was talking to her [Ms. Elder], and she told me that she didn't dispute the fact that I was sick, and I could have had a legitimate reason. She says, unfortunately, you missed too much time and that's why you were let go. [Tr. 72]

On cross-examination, Ms. Ouimette testified:

> Q. . . . Ms. Ouimette . . . you knew that three days off in such a short period of employment wasn't very good?
>
> A. But, I was sick.
>
> Q. . . . I understand that you are telling me that you were sick. But, you also understand that three days absence out of, what I understand, was 29 working days, that's not very good, is it?
>
> A. No.
>
> Q. And, that's in fact about one day away every two weeks, isn't it?
>
> A. I guess it's bad timing. [Tr. 126]

The Commission, however, attempted to impute to Mr. Sawyer direct discrimination on the basis of handicap. The Commission seemed to have taken a range of positions, all of which lacked probative value, and in at least one instance, putting it in the best possible light, appeared to be contrived.

(1) Mr. Sawyer is alleged to be the person who, in fact, ordered the dismissal of Ms. Ouimette. In paragraph five of the *Record of Statements and Positions of Respondent and Complainant* [Ex. 13], Ms. Ouimette contends that "[Mr. Gemottine] informed me that his supervisor, Mr. Paul Sawyer, was letting me go because I had too many medical problems which could result in excessive absenteeism." Yet, Ms. Ouimette in cross-examination made it clear that *no names were mentioned as to the so-called people above him who had ordered her dismissal:*

A. . . . [Mr. Gemottine said] the people above me told me to let you go, and you've had too many medical problems.

Q. Did he say who the so-called people above him were?

A. *No, he didn't mention names. He just said people above me.*

(2) Next, the Commission noted that Mr. Sawyer had the power to overrule Mr. Gemottine, and that he allegedly offered reasons contradictory to those of Mr. Gemottine for the discharge of Ms. Ouimette. In that regard, the basis for the Commission's position was a so-called Commission *Record of Initial Contact*. This is attached to the Award as an Appendix. Commission Counsel called Fiona Crean, a Human Rights Officer for the Commission in 1986. Ms. Crean apparently was an in-take officer who received the complaint of Ms. Ouimette by telephone on March 27, 1986, and then contacted Mr. Sawyer concerning the allegations made and elicited his response by telephone on April 1, 1986. Ms. Crean had no independent recollection of the events surrounding the in-take. All that she had was the *Record of Initial Contact* that reflected her notes made at the time of each call.

The notes contain no indication as to the length of the conversation with Mr. Sawyer. Nor do they indicate the questions which were asked of him. Further, Mr. Sawyer was not afforded the opportunity at the time to review the summary made, and to comment on its accuracy.

Finally, I must note that this does not appear to be a document which, on its face, was carefully drafted. I rather think that it appears to be what Ms. Crean, herself, alluded to, namely, a staff attempt at rapid-fire response to a complaint. I think it inappropriate to give the document, as such, any considerable weight.

The more reflective inquiry of the Commission touching upon the role of Mr. Sawyer came later, in January 1987, with the investigation by Roger Palacio, a Human Rights Officer with the Commission. He had narrowed the question, which in his view divided the parties, to whether Ms. Ouimette was discharged because of her physical condition, or because of absenteeism, itself.

To answer that question, Mr. Palacio questioned both Mr. Sawyer and Ms. Elder. Nothing was said in those interviews by either Mr. Sawyer or Ms. Elder about Ms. Ouimette's "health problems" as a basis for discharge.

Rather, Mr. Palacio sought and obtained data relating to employee terminations for probationary absenteeism during the relevant period. On direct examination, he offered the following testimony:

> Q. Could you tell me what you determined on examination of the document(s) dealing with probationary employees?
>
> A. *Well, it seemed to be consistent with what they advised me, that this unwritten policy was being implemented, regardless of cause, and dismissal would follow once three or more absences are incurred within the period of probation.* [Tr. 271-272]

The only example of individuals who exceeded three absences during the probationary period related to students. This was during the summer; the students were terminated before August 31, 1986, and they were not to be rehired. This fell within the ambit of article 9.13 of the Collective Agreement between the Company and the Union which permitted the employment of *student help from June 1 to August 31 of each year, and denied such persons seniority status so long as they were terminated by August 31.* [Tr. 281-282]

There has been no factual basis for a finding of direct discrimination by Mr. Sawyer against Ms. Ouimette. The most that can be said is that Mr. Sawyer refused to overrule the decision of Mr. Gemottine because it fell within the Company's internal three-day probationary rule. Indeed, such seemed to be the conclusion of the Commission's Human Rights Officer who had primary carriage of the *in-depth investigation.*

B. Indirect or Systemic Discrimination: Section 10

The Commission has taken the position that the three-day probationary rule constitutes indirect or systemic discrimination. It does so, according to the Commission, because it impacts adversely on handicapped persons, namely, those who suffer allergic reactions and/or those who suffer from the flu (gastroenteritis).

The evidence as to this portion of the Commission's case is scant. It may be summarized as follows:

- The three-day probationary rule was described in the previous sub-section of this Award. It is a rule which, according to the Commission's own investigator, has been applied rigorously with

the exception of students employed during summers. The reason for the exception as to students relates to the Collective Agreement: Students whose positions are terminated by August 31st, regardless of the probationary period, do not become seniority-rated employees.

- The three-day rule was established by the Company more than twenty years ago. It is designed to set a standard for good attendance when employees become seniority-rated.

- The three-day rule has not been published. It is an unwritten rule enforced by management. In this regard, the Collective Agreement gives management substantial discretion because probationary employees, while members of the bargaining unit, are denied access to the grievance procedures of the Collective Agreement.

- Ms. Ouimette was subject to a 60-day probationary period. It is fair to say that employees who passed that probationary period did not necessarily demonstrate good attendance. Mr. Sawyer estimated overall absenteeism among employees at about eleven percent during the time when the 60-day probationary period was in effect. However, the Company pressed for and obtained in the current Collective Agreement an extension of the probationary period from 60 to 90 days. In Mr. Sawyer's view, which was not contradicted, this has had the effect of lowering absenteeism from eleven percent to eight percent.

- In relation to short-term absences, the probationary period is the Company's only effective means to influence attendance through discipline. Here the Company can and has acted with unchecked discretion through implementation of the three-day rule.

However, once employees obtain seniority, that is, once they have passed the probationary period and may claim access to the grievance procedures of the Collective Agreement, the Company is severely limited in the controls that it may exercise over absences. Employees intent on retaining their status may not be discharged unless for just cause. Presentation of a doctor's certificate *prima facie* establishes the *bona fide* nature of the absence. It then becomes the burden of the employer to show that

that absence was not justified, a difficult burden to carry.

The Commission characterizes the fact that management maintains employees with relatively high absenteeism as "accommodation." If the Commission means this is a voluntary state acceptable to the employer, then the claim must be rejected. It is a state resulting from a negotiated collective agreement. By the nature of things, trade-offs were involved on the part of both the Company and the Union. It cannot be said that management has unilaterally imposed the seniority-rated system for handling absences.

• Finally, there is the quite important matter of just who is disadvantaged by the three-day policy. The Commission has defined the disadvantaged, or handicapped, groups as those who have allergic reactions to medications and/or those who have the flu, medically called, gastroenteritis.

The only evidence going to allergic reaction was that relating to Ms. Ouimette. Her allergies were listed. I heard how *she thought that she had taken medicine that had an aspirin component.* There was absolutely no evidence as to the nature of the medicine that she had taken. This Board was told by Ms. Ouimette that she had been given medicine by a friend and, without inquiring as to its contents, she took it to relieve pain.

There was, however, evidence that Ms. Ouimette had been specifically cautioned by her physician not to take any medicines containing aspirin. That warning had been given close in time to the absence. There can be little doubt that Ms. Ouimette, to say the least, was negligent in failing to check the medicine she had been given.

The Commission's complaint, three years old by the time it came to hearing, and amended once, was written in terms of allergic reaction. The facts simply do not demonstrate an allergic reaction. This is not to deny that such a reaction might have taken place. Nor is it intended to question the good faith of Ms. Ouimette. The point is that it is the Commission which must carry the burden of proof as to the facts alleged in the complaint, and this simply was not done.

Next, there is the matter of those suffering from the flu. The evidence as to Ms. Ouimette having the flu as a matter of medical diagnosis is derived from the affidavit of Dr. Chiu. It must be emphasized in this regard that Dr. Chiu took the symptoms as they were described by Ms. Ouimette. Assuming her description to have been accurate, Dr. Chiu stated that she had the flu. At the time of his examination, she did not manifest any of the symptoms of the illness.

Dr. Caulford was the Commission's expert on the flu. In effect, he said that it affects "all of us." This was the sum total of his testimony:

> Q. Doctor, can you tell me what gastroenteritis is?
>
> A. Yes. It is an acute inflammation of the gastrointestinal lining, usually brought on by a virus or bacteria. [It] results in nausea, vomiting, diarrhea. [It] usually is of 48 hours duration . . . and settles down as quickly as it came.
>
> Q. Who is susceptible to gastroenteritis?
>
> A. All of us.
>
> Q. And, could you tell us what the incidence of gastro-enteritis there is in a population?
>
> A. It depends on the timing and the population, but it is present at all times. It tends to peak in the spring and the fall, and its attack rate is maybe one attack per [year] or every two years. Sometimes more often, depending on the person and their employment . . . . Doctors get it more often. [Tr. 180-181]

Thus, the group intended to be protected through the Commission's complaint is everyone in the sense of those who, at any time, become susceptible to the flu and might be subjected to dismissal because of the Company's three-day rule.

III
Findings of Law

A. The Relationship Between the Human Rights Code and the Collective Agreement

In other portions of this Award, I noted that the Company was bound by a Collective Agreement with the Union. Under the terms of that Agreement, probationary employees were not given access to the grievance procedures. However, seniority-rated employees could call upon the just-cause provisions of those procedures to question any imposed discipline, including discharge. This meant that the Company had limited discretion, as applied to seniority-rated employees, to impose unilateral rules relating to attendance. The same restraints on management were not applicable to probationary employees.

The Findings of Fact compelled the conclusion that the Company imposed its three-day internal rule as a means to eliminate potential attendance problems. Whether management achieved this objective might be another question. The facts do indicate that several employees who passed probation later had a number of absences. Yet, the fact remains that the three-day rule was imposed in good faith by management. This is not to say that rule cannot be questioned under the *Human Rights Code*. It is only to provide the appropriate context for viewing the formulation and implementation of the rule.

Next, the Commission seemed to argue that the grievance procedures available to seniority-rated employees could be applied to those on probation. It may be that the remedial powers available for violation of the *Human Rights Code* would permit a Board of Inquiry to order such an extension of the grievance procedures. However, it would be wrong to suggest that either the Company or the Union had the *unilateral right* to extend the full range of the grievance procedures (e.g. the just-cause standard) to probationary employees. The Collective Agreement is a contract, the terms of which are binding between the parties, namely, the Union and the Company.

Finally, there is the matter of summer students. In its evidence, the Commission pointed to what appeared to be random application of the three-day rule: Some employees seemed to be exempt from its application. The reality was that the rule was not always applied to summer students. The reason, mentioned elsewhere in this Award, was that summer students

were not to achieve seniority-status so long as they were terminated before August 31st. Such were the terms of the Collective Agreement.

B. Allergic Reaction: Reckless Negligence

The Commission's case in that portion of the complaint going to direct discrimination related in part to an allergic reaction by Ms. Ouimette resulting in an asthmatic attack. For the purpose of this part of the Award, I will assume that allergies and asthma are handicaps within the meaning of section 4(1) and section 9(b) of the *Human Rights Code*. (See, *In the Matter of David Morgach and the City of Ottawa*, August 4, 1989 (Hubbard), unreported.)

The Findings of Fact resulted in the conclusion that there was no discrimination by any of the Respondents on the basis of allergic reaction resulting in an asthmatic attack. Indeed, there is *no evidence to support Ms. Ouimette's conclusion that she had an allergic reaction at the time of her first absence*. To repeat what was said elsewhere in this Award, this is not to deny that she was ill; it is simply to say that the cause of that illness was never proved.

However, for the moment, let us assume that Ms. Ouimette did suffer an allergic reaction because she took medicine that contained aspirin, as she stated. This action on her part, as Commission Counsel argued, could hardly have been wilful. However, there is no doubt that Ms. Ouimette, according to the testimony of her own physician, had been warned by her physician only a short time before the incident to avoid aspirin. That caution was both clear and specific: If she took aspirin, she could expect an asthmatic attack.

Granted that Ms. Ouimette suffered from allergies that could manifest themselves in an asthmatic incident. As the Commission, itself, made great efforts to demonstrate, the asthma from which Ms. Ouimette suffered was extrinsic. That is, it was caused by allergies or other factors external to her. In another matte,r the difference between extrinsic and intrinsic asthma was well stated:

> There was considerable questioning and evidence about intrinsic and extrinsic asthma. The gist of it would appear to be that there are asthmatics whose episodes are triggered by external causes be they allergens or general environmental causes. Intrinsic asthma is more likely to be caused by internal situations -- a bronchial

hyper-irritability. [*Delager v. Department of National Defence*, 7 C.H.R.R. D/3508, at D/3513]

Ms. Ouimette had the power to control the ingestion of aspirin. She knew that she had to be careful; her doctor told her so. He said some responsibility had to be assumed by her as patient for her own health. Ms. Ouimette had stated that her asthma was under control at all times during her employment. For a time, that control was lost when she failed to even ask about the composition of the medicine a friend had handed her to relieve pain.

Is this the kind of fact situation to which the handicap protections of the *Human Rights Code* are intended to apply? I think not. I think to press such a fact situation to complaint trivializes the broad and important principles of the *Human Rights Code*. Commission Counsel cited, quite properly I believe, *Ontario Human Rights Commission and Simpson-Sears Limited* (1985) 2 S.C.R. 536, for the proposition that human rights legislation is to be given an expansive reading to further its broad purposes:

> Legislation of this type is of a special nature, not quite constitutional but certainly more than the ordinary -- and it is for the courts to seek out its purpose and give it effect. The [Human Rights] Code aims at the removal of discrimination. This is to state the obvious. Its main approach, however, is not to punish the discriminator, but rather to provide relief for the victims of discrimination. It is the result or the effect of the action complained of which is significant. If it does, in fact, cause discrimination; if its effect is to impose on one person or group of persons obligations, penalties, or restrictive conditions not imposed on other members of the community, it is discriminatory. [*Id.*, at 547]

But, what is the broad purpose or purposes of that provision of the *Human Rights Code* prohibiting discrimination on the basis of handicap? We are given the interpretation provision in section 9(b)(i) which the Commission apparently chooses to construe *literally and, in my view, without regard to context* as it might apply not just to allergic reactions resulting in an incident of asthma, but also as it might apply to the flu:

> 9(b) - "because of handicap" means for the reason that the person has or has had, or is believe to have or have had,

> (i) any degree of physical disability, infirmity, malformation or disfigurement that is caused by bodily injury, birth defect or *illness* and, without limiting the generality of the foregoing, including diabetes mellitus, epilepsy, any degree of paralysis, amputation, lack of physical coordination, blindness or visual impediment, deafness or hearing impediment, muteness or speech impediment, or physical reliance on a dog guide or on a wheelchair or other remedial appliance or device.

The Commission's approach to the complaint is that on one day Ms. Ouimette was absent from work because she had an allergic reaction resulting in an asthmatic attack. It matters not that she induced that attack through an act of reckless negligence. The employer counted that absence as one of three for which any probationary employee would have been discharged. To the employer, it would have made no difference if Ms. Ouimette had twisted her ankle, or broken a finger on the day in question. Three days absence for any probationary employee, regardless of reason, meant dismissal. The principle argued by the Commission was that *any sickness, so long as it can be justified, regardless of how it was caused, is an illness within the literal meaning of the word as it is used in section 9(b)(i).*

As I stated, I believe such an interpretation does violence to the broad principles of the *Human Rights Code*. It trivializes the important goals of that Code generally, and specifically, as it applies to the prevention of discrimination on the basis of handicap.

Professor Cumming in *Cameron v. Nel-Gor Castle Nursing Home*, 5 C.H.R.R. D/2170 (1985), handed down the first decision dealing with the question of discrimination on the basis of handicap under the then newly proclaimed *Ontario Human Rights Code*. There he fully developed not only the broad purposes of the Code in general, but also that provision relating to handicap. He stated at D/2180:

> The objectives of the *Code's* handicap provisions as they relate to employment are several.
>
> First, there is the objective of securing for the handicapped person equality of opportunity with respect to employment. Everyone deserves the same opportunity and chance to make the most of life, regardless of physical or mental handicap.

> A corollary is to require an employer to make a decision respecting employment of a handicapped person based upon a fair and accurate assessment of her true ability, and not based upon a stereotype or misconception about her handicap. *Having a handicap means not being able to do one or more important things that most people can do.*
>
> The law cannot make a person's handicap disappear, of course, but it does insist that every person receive a fair chance to show what she is able to do, taking into account her ability. The law now protects every person from being *pre-judged* because of handicap by an employer. Equal opportunity for someone with a handicap means equal opportunity to do the things she can do effectively and safely. The law does not impose any undue hardship upon the employer, or require that a person who presents a danger to the safety of the employee or others, or the employer's property, be employed.

It is not the handicap *qua* handicap that results in protection for the individual. Rather, it is the denial of equal opportunity, in this instance, where an employer imposes an *artifical barrier* to employment because of handicap that in fact presents no real inability to do the job. Applied to the assumed facts in this matter, the employee was absent for one day because, through an act of reckless negligence, contrary to the express instructions of her doctor, she took medicine, namely, aspirin, to which there was sure to be an allergic reaction. How is it possible to say that the employer imposed an artificial barrier to her employment on the basis of handicap? The employee by her own action initiated the external stimulus that resulted in the asthmatic incident. In the effort to achieve equality, the employee is not a passive individual. She also bears certain responsibili- ties before the claim of discrimination because of handicap can be interposed. [See, *Legge v. Princess Auto and Machinery Ltd.*, 4 C.H.R.R. D/1339, at D/1346 (1983).] Accepting the facts as given by the Commission, I do not believe it possible to find employer discrimination on the basis allergies and/or asthma. (Of course, for the reasons stated, I cannot accept the assumed facts. My reason for setting out the analysis of the law is to indicate what I believe to be the trivial nature of the Commission's complaint as to this aspect of the case.)

C. The Flu (Gastroenteritis) as an Illness

Again, citing section 9(b)(i) the Commission argued that the flu, something

that its expert, Dr. Caulford, said affects all of us, even with a certain amount of regularity, is a handicap quite simply because it is an illness. The fact that it does affect everyone, and that it is of short duration, in the Commission's presentation of the complaint did not take away from the sickness being classed as a handicap within the meaning of the *Code*.

Counsel for the Commission could cite no precedent in support of her position. It was in this context that she termed the complaint a *test case*. To accept the Commission's argument would be to denigrate the important purposes of the *Code* and, more particularly, the provision prohibiting discrimination on the basis of handicap.

To state the obvious initially, it is difficult to identify the group for whom protection is sought. The Commission would include in that group all those who are subject to flu, even though literally everyone would be encompassed as the potentially handicapped. (See, *Romano v. Board of Education for the City of North York*, 8 C.H.R.R. D/4347 (1987), appeal dismissed, Supreme Court of Ontario, Divisional Court, Nov. 24, 1988.)

There is, however, an even more significant consideration: the transitory nature of flu. It lasts but a few days and then it is over. Can such an illness be defined as a handicap? Professor Cumming in *Cameron v. Nel-Gor Castle Nursing Home*, *supra*, implied that a handicap should be construed to mean something which affects, or is perceived to affect, an individual in carrying out life's important functions: "*Having a handicap means not being able to do one or more important things that most people can do.*" (*Id.*, at D/2180).

Certainly, section 9(b)(i) of the *Code* is amenable to such a construction. Consider the examples given of diabetes mellitus, epilepsy, any degree of paralysis, amputation, lack of physical coordination, blindness or visual impediment, deafness or hearing impediment, muteness or speech impediment, or physical reliance or a dog guide or on a wheelchair or other remedial appliance or device. The entire list relates to substantial ongoing limits on one's activities.

This is not to deny that an episodic event, such as a heart attack, which an employer might construe as limiting an individual's ability to do a job, as also being included in the classification of handicap. But, even here, the denial is based on a perception that the event, the heart attack, will be an ongoing material source of impairment. (See, *Anderson v. Atlantic Pilotage Authority*, 3 C.H.R.R. D/193 (1982), cited by Professor Cumming at

D/2181.)

Though it relates to another jurisdiction, and though the law is somewhat different, the statement of the United States Court of Appeals for the Fourth Circuit in *Forissi v. Bowen*, 794 F.2d 931 (4th Cir. 1986) is relevant. The case concerns a claim of improper discrimination under the U.S. *Rehabilitation Act of 1973*, 29 U.S.C.A. §§ 7(7)(B), 505, as amended, 29 U.S.C.A. §§ 706(7)(B), 794a. The claimant suffered from acrophobia which interfered with his ability to carry out assigned job functions at a particular point in time. He said that acrophobia had not substantially limited his major life activities. In his deposition, he stated: "My fear of heights never affected my life at all on any job or anything . . . . It never was a problem before I got this job here . . . . " The court held:

> To succeed in his claim, Forisi must first establish that he is a handicapped person within the reach of the statute. The Rehabilitation Act of 1973, as amended, defines the term "handicapped individual" at 29 U.S.C.A. §706(7)(B) as "any person who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such impairment, or (iii) is regarded as having such impairment." The district court correctly held that plaintiff failed to satisfy this threshhold test. (*Id.* at 933)
>
> . . .
>
> The Rehabilitation Act assures that truly disabled, but genuinely capable, individuals will not face discrimination in employment because of stereotypes about the insurmountability of their handicaps. It would debase this high purpose if the statutory protections available to those truly handicapped could be claimed by anyone whose disability was minor and whose relative severity of impairment was widely shared. *Indeed, the very concept of an impairment implies a characteristic that is not commonplace and that poses for the particular individual a more general disadvantage in his or her search for satisfactory employment.* [*Id.* at 934]

In my view, it would be wrong to attempt to stretch the meaning of *illness* under section 9(b)(i) of the *Code* to include the flu. It would be wrong to do so, in part, because of the effect of such a construction on the high purpose otherwise achieved by the interpretation provision in protecting those who are actually or perceived to be materially impaired through

illness. Where the *Code* calls for defined groups to be protected, the Commission would include literally everyone suffering from a few days' illness. I cannot accept that the intent of section 9(b)(i) is to embrace such kinds of discrimination.

D. Sickness

I have tried to fathom the Commission's intent in bringing this complaint as a so-called "test case." At the start of this Award, I noted that if indeed it were a test case, then there was a need for a solid factual foundation in support of the theory behind the complaint. To say the least, that factual foundation was lacking, even three years after the complaint was lodged.

At bottom, giving the best possible face to the Commission's case, the attempt behind the complaint seemed to be to impose the protection of the handicap proviso of the *Code* on *any absence for sickness* that might result in discipline or termination of employment. I appreciate the sense of wrong that Ms. Ouimette in good faith felt when her job was ended solely because she had been absent for genuine sickness for three days. In her mind, there seemed to be no justification for such action. After all, in other respects, she seemed to be an acceptable employee. If she had passed her probationary period and had been a seniority-rated employee, any attempt by the Company to discharge her for three days of innocent absenteeism probably could have been successfully challenged under the grievance procedures of the Collective Agreement.

But, this Board of Inquiry is not a court with plenary powers. Nor is it a board of arbitration. The responsibility of this Board is to measure the complaint against the *Human Rights Code* and determine whether a violation has occurred and, if so, what remedy should be imposed. The *Human Rights Code* has not been drafted to make sickness generally a handicap within the meaning of section 9(b)(i). The Commission has attempted to achieve that end. On the face of it, there is no justification for doing so in law.

E. Costs

The Respondents have asked for an award as to costs on a solicitor-client basis. Section 40(6) provides:

> Where, upon dismissing a complaint, the board of inquiry finds

that,

(a) the complaint was trivial, frivolous, vexatious or made in bad faith; or

(b) in the particular circumstances undue hardship was caused to the person complained against, the board of inquiry may order the Commission to pay to the person complained against such costs as are fixed by the board.

This matter, in my view, fully warrants that I exercise my discretion and award costs. For the reasons stated above, there was an absence of facts necessary to prove the allegations of the complaint. And, the Commission was aware of this void at the time of hearing. Further, the complaint, itself, was materially deficient in law. While the complaint cannot be found to have been made in bad faith, or to have been vexatious, it was trivial and frivolous. [*Pham v. Beach Industries Ltd.*, 8 C.H.R.R. D/4008, at D/4024 (1987)]

Award

1. The complaint is dismissed for the reasons given above.

2. The Respondents are awarded their costs in terms of all of their actual solicitor's costs. This is to be done as if such costs were awarded on a solicitor-client basis in the Supreme Court of Ontario.

3. I will remain seized of this matter should the parties be unable to agree upon the amount to be awarded.

It is so ordered.

Dated this 19th day of March 1990, at Toronto, Ontario.

Dr. D.J. Baum, Board of Inquiry